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Nos. 82-206 and 82-229 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner

v.

CARL W. STOTTS, *et al.*,
Respondents

MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners

v.

CARL W. STOTTS, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners in these consolidated cases respectfully submit this joint reply memorandum in this matter pursuant to Supreme Court Rule 34.4.

ARGUMENT

I. The Appeal Is Not Moot

Respondents contend that this appeal is moot because (1) the preliminary injunction of the District Court is without continuing effect (Respondents' Brief pp. 24-

32) and (2) this matter is not one which is "capable of repetition yet evading review" (Respondents' Brief pp. 32-45). This matter is not moot, and even if it would otherwise be moot, it falls within that category of cases which are "capable of repetition yet evading review." Petitioners reassert their arguments contained in the Joint Opposition to Respondents' Suggestion of Mootness herein (hereinafter the "Joint Opposition")[1] and will limit their response herein to the points raised by Respondents in their brief on the merits herein.

Respondents have failed again to sustain their heavy burden of demonstrating mootness in their renewed argument. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). They are incorrect in their assertion that the orders of the District Court have no con-

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[1] On May 23, 1983 Respondents filed a suggestion of mootness in these cases. On May 24, 1983 the clerk of the Court advised counsel for Petitioners that a response to this suggestion should be filed "as promptly as possible." Petitioners sought to comply and did so by filing their Joint Opposition to Respondents' Suggestion of Mootness on May 27, 1983. On June 6, 1983 the Court granted the petitions for a writ of certiorari in these cases and consolidated them for review. Respondents have renewed their suggestion of mootness in their brief on the merits (Respondents' Brief pp. 24-45).

Petitioners wish to advise the Court that two of the examples of continuing adverse effects of the injunctions on incumbent nonminority firefighters contained in the Joint Opposition have no application to the particular employees who were affected by the layoffs in controversy. First, no employee who was laid off in 1981 was eligible for automatic promotion to captain after 30 years' service (*see* Joint Opposition p. 5; Respondents' Brief p. 29). Second, no employee lost an opportunity to take examinations for the purpose of securing promotions to the next higher rank as a result of the injunction (*see* Joint Opposition p. 6 n.1; Respondents' Brief pp. 29-30). All other continuing effects of the injunction referred to in the Joint Opposition do impact individual employees. Petitioners wish to apologize to the Court for the aforementioned inaccuracies. As noted above, the Joint Opposition was prepared hastily to comply with the advice of the clerk of the Court to file our response "as promptly as possible."

tinuing effects. Not only did laid-off workers and demoted employees lose pay, but the nonminority incumbents who were placed on layoff status as a direct result of the District Court's injunction, Harmon, Dennington and Darden, have lost competitive seniority in relation to all other individuals in the class of 32 fire privates from which they were hired, including those minority employees who would have been laid off but for the District Court's orders (*see* Respondents' Brief, Appendix D).[2] Even if the Court confines its inquiry to these three individual employees, as Respondents have done, it is clear that those orders have continuing effects on those employees. These individuals have been rendered less senior for purposes of future job decisions and entitlements, including a lessened expectation of future promotion, a decreased priority in bidding on certain jobs and job transfers, and loss of seniority for future layoffs.

Respondents attempt to explain away these continuing effects by contending that they are de minimis (Respondents' Brief p. 32). While Petitioners dispute that such effects are de minimis, an otherwise live controversy is not moot merely because the direct consequences of the lower court's ruling are continuing, yet de minimis in nature. To the contrary, this Court has held that even

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[2] In accordance with the City's Layoff Policy, as modified by the District Court's injunction, all employees who were adversely affected thereby were laid off from their classification (J.A. 85). Among those who were so laid off, higher-ranking employees were entitled to "bump down" or accept a demotion to a lower rank (J.A. 85). The lowest-ranking employees had no bumping rights, and were placed on layoff status (J.A. 85). Contrary to Respondents' position that employee demotions are not included within the scope of the Questions Presented herein by Petitioners (Respondents' Brief p. 15 n.15), the issues raised in this matter concerning both layoffs and demotions are fairly included in the Questions Presented. *See* Sup.Ct.R. 21.1(a). *See also Peters v. Kiff*, 407 U.S. 493, 494 (1972). As employed herein, the term "layoffs" will include within its contemplation both layoffs and demotions attendant thereto, unless otherwise noted.

potential collateral consequences of an order can suffice to keep an otherwise moot question live for purposes of review before this Court. *See Sibron v. New York*, 392 U.S. 40, 55 (1968). The instant case presents the Court with direct and continuing adverse consequences of the lower court's injunctions,[3] the effects of which plainly are concrete and significant, despite Respondents' attempt to characterize them as trivial.

Respondents also contend that this appeal does not fit into that exception to the general rule of mootness in cases that are "capable of repetition yet evading review." (Respondents' Brief pp. 32-45.) To support this contention, Respondents raise three main arguments: (1) future layoffs would not involve an identity of parties with that involved in the instant dispute (Respondents' Brief p. 37); (2) layoffs and the controversies they engender are not so inherently short-lived as to evade full appellate review (Respondents' Brief pp. 39-45); and (3) there is no reasonable expectation that layoffs will recur (Respondents' Brief pp. 33-35). None of these arguments has merit.

First, any future layoffs would, in fact, involve an identity of parties with that involved in the instant dispute. The analysis that has been utilized by this Court requires that "the same complaining party would be subjected to the same action again." *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). However, when the case under review involves a class action, the

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[3] In this respect, the instant case is similar to *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968). In *Carroll*, all that remained for review by this Court was the validity of a 10-day restraining order which enjoined an organization from holding certain rallies for a period that had long since passed when this Court undertook review. However, the Court held that the appeal was not moot because "Petitioners have sought to continue their activities . . . and it appears that the decision of the Maryland Court of Appeals [upholding the 10-day injunction] continues to play a substantial role in the response of officials to their activities." *Id.* at 178.

Court has proceeded with the assumption that the class representative stands in the place of those who will be adversely affected by the complained-of action in the future. *See, e.g., Sosna v. Iowa*, 419 U.S. 393 (1975).

It is Respondents who might be considered the "complaining party," as they allegedly were aggrieved by the City's application of its seniority system in the layoff circumstance. Respondents are, in fact, a court-certified class including all present and future black employees of the Memphis Fire Department (City Pet. A.61). If layoffs recur, during the life of the consent decree, members of the Respondent class will be subjected to the same complained-of action again.

The City and the Union may also be viewed as the complaining parties, having been enjoined from the routine application of their nondiscriminatory seniority system in favor of a contested interpretation or modification of the consent decree. If layoffs recur, the identity of these parties will not change. Thus, under either analysis, the same complaining party will be subjected to the same action.

Second, layoffs and the controversies they engender are of that type of cases that are typically so short-lived as to evade full appellate review. This Court has recognized that layoffs are ordinarily "[a] period during which a workman is *temporarily* dismissed." *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 287 n.11 (1946); *CBS, Inc. v. International Photographers, Local 644*, 603 F.2d 1061, 1063 (2d Cir. 1979). As such, layoffs are similar in nature to economic strikes which have been recognized to be of comparatively short duration, even though there are exceptions. *See Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126 (1974).[4] Like economic strikes, the great majority of

[4] The problem of layoffs and concomitant demotions in public employment that underlies this dispute is of continuing practical significance, as Respondents point out (Respondents' Brief pp. 40-

layoffs and reductions in force do not last long enough for complete judicial review of the controversies they engender. *Id.* Thus, this case falls squarely within that category of cases to which the "capable of repetition yet evading review" exception has been applied by the Court.

Finally, while no party to this dispute desires a recurrence of the 1981 layoffs, a reasonable expectation exists that layoffs will recur within the life of the consent decree.[5] Although the City has faithfully adhered to it, the consent decree is anticipated to remain in force for some time to come. During that extended period, the same principal factors which combined to make necessary the 1981 layoffs, legal prohibitions against deficit spending by the City,[6] a limited tax base, and high interest rates,[7] still persist, making reasonable the expectation that layoffs will recur if any single factor changes detrimentally. The City of Memphis has an extremely limited tax base. State or local income taxes may not be imposed in Tennessee, being unconstitutional. *Evans v. McCabe*, 164 Tenn. 672, 52 S.W.2d 159 (1931), interpreting Tenn. Const. Art. 2, § 28. The two principal sources of income for a municipality in Tennessee are the sales tax and ad valorem real property tax. The City is now levying sales tax at the maximum rate allowable under state law. *See*

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41). The important questions raised by this appeal must be resolved to give needed direction to litigants and the federal judiciary.

[5] It is the City, rather than Respondents, who is in a better position to evaluate the potential for future layoffs.

[6] *See* T.C.A. § 6-56-205.

[7] The 1981 layoffs were necessitated in no small part by the high interest rates persisting at that time. While Respondents disingenuously speculate that the factors contributing to the 1981 layoffs will not recur until 2143 (Respondents' Brief p. 34), there are concrete indications that interest rates may again be on the rise. *See* Wall St. J., Nov. 14, 1983 at 1, col. 5. Petitioners would again point out that similar actions have recently been necessitated in many other cities within the recent past. *See* Union's Brief pp. 19-20.

T.C.A. § 67-3050. It cannot raise the sales tax. While property taxes were decreased on a one-time basis recently upon the last sales tax increase, that tax is likewise near its limits. Tennessee law dictates that industrial and commercial property be assessed for ad valorem property taxation purposes at forty percent (40%) of its value, while residential property be assessed at twenty-five percent (25%) of its value. Tenn. Const. Art. 2, § 28. Therefore, any increase in property taxes discourages new business and industry from moving into Memphis. Given these limits on the ability of the City to raise revenue, prevailing high interest rates and constantly increasing expenditures for employee wages, employee health care and utility costs, the situation warrants a conclusion that there is a reasonable expectation of future layoffs during the period the consent decree is in effect. At the very least, Respondents have failed to meet *their heavy burden* to establish mootness.

II. The District Court Failed To Properly Apply The Law

A. *The Appropriate Standard of Review*

Petitioners acknowledge that the grant of a preliminary injunction is generally reviewable only for an abuse of discretion. *See University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Of course, improper application of the law is itself an abuse of discretion. *See, e.g., United States v. School District of Ferndale*, 577 F.2d 1339, 1350-51 (6th Cir. 1978). A limited standard of review is appropriate if, as is ordinarily the case at a preliminary injunction hearing, the District Court merely acts to preserve the status quo until a trial on the merits can be held, the injunction is based on an abbreviated set of facts, and the record indicates the necessity for a full trial on the merits to resolve the controversy. *See Camenisch*, 451 U.S. at 395, 397.

Consistent with this reasoning is the rule that when the availability of preliminary relief turns on interpretation of the law rather than on the facts, the appellate

court is free to review de novo the district court's judgment. *E.g., Pratte v. NLRB*, 683 F.2d 1038, 1040 (7th Cir. 1982). The instant case is one to which this rule applies. At the hearing on Respondents' request for preliminary injunctive relief, the facts were uncontroverted, with counsel for Respondents conceding the City's financial need to layoff certain of its employees in the Fire Division (J.A. 75).

Unlike *Camenisch*, the Respondents' prayer for preliminary relief came at a time when this litigation was more than four years old, after years of extensive discovery and intensive negotiations with which the District Court was thorougly familiar (City Pet. A. 2; Respondents' Brief p. 61). It followed the entry of a consent decree resolving Respondents' claims against the City from which Respondents had represented that they would seek no further relief save to enforce the provisions of the decree itself (City Pet. A. 61). The District Court at no time indicated that further proceedings would be necessary in the seven weeks between the hearing and the commencement of layoffs or that the record needed further development before a decision could be made (J.A. 29-81; City Pet. A. 72-76). *Cf., Camenisch*, 451 U.S. at 397-98.

It is clear from the record that a subsequent trial on the merits never was contemplated by Respondents or the district judge. Rather than remaining within the office of a preliminary injunction, which "is merely to preserve the relative position of the parties until a trial on the merits can be held," *id.* at 395, the District Court granted relief which *changed* the relative positions of the parties as a result of that Court's erroneous view of the law (*see* J.A. 30-31; City Pet. A. 72-76; City Pet. A. 11 n.6). Contrary to Respondents' assertion that the lower courts merely preserved the status quo, the status quo was the application of the seniority system or Layoff Policy in light of (1) the City's policy to lay off based on seniority

in existence since 1973 and embodied in the Memorandum of Understanding with the Union since 1975, and (2) the fact that the consent decree in no way modified or even addressed the manner in which the City could conduct layoffs. Nevertheless, the District Court enjoined the seniority-based layoffs.

Under these circumstances, it is proper for the Court to engage in de novo review of the District Court's judgment. However, even if a de novo review of the judgment is not in order, Petitioners submit that the courts below erred in applying the law. Therefore, under the abuse of discretion rule, the judgment must be reversed, as well.

B. *The District Court's Injunctions Did Not Result From a Mere Interpretation of the Consent Decree*

Respondents assert that the proposed seniority-based layoffs at issue herein would have violated the terms of the consent decree (Respondents' Brief p. 52), and that the District Court's injunctions merely compelled compliance with the terms of the consent decree on the part of the City (Respondents' Brief p. 53.). The Court of Appeals agreed (City Pet. A.33). This assertion and ruling cannot withstand analysis.

The record is clear that the consent decree resulted from arm's length negotiations between the City and Respondents. The City agreed to specific limitations on its managerial prerogatives in regard to the hiring and promotion of minority personnel in order to achieve long-term hiring and promotional goals in its Fire Division (City Pet. A.64-65). The consent decree did not contain rigid timetables for hiring and promotion. *Cf. Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981). Neither did the City agree that once a given percentage of minority representation was *attained* in a rank, that percentage (or those individuals) must be *maintained* through insulation of minority employees from adverse job actions, nondiscriminatory in purpose, that remained within the City's management prerogatives.

As Respondents concede, once a consent decree has been approved, any claims for additional relief are to be judged by reference to the terms of the settlement itself (Respondents' Brief pp. 50-51). However, the relief they secured, in fact, went well beyond that afforded by the explicit terms of the consent decree and was awarded without reference to the terms of the settlement. Respondents cannot point to a single term of the consent decree that was violated by the City or would have been violated by the City by the implementation of the Layoff Policy at issue herein. The District Court noted that Respondents had made no suggestion that the City had been contemptuous (City Pet. A.75). Neither did Respondents contend that the Layoff Policy was motivated by a discriminatory purpose or by a desire to evade the requirements of the consent degree (Respondents' Brief p. 37).

Respondents do attempt, however, to make a case for asserted consent decree violations by the City. First, they charge that the demotions under the Layoff Policy of "Exhibit A" promotees violated ¶ 9 of the decree. Under examination, ¶ 9 requires the City to make those promotions, which were, in fact, carried out. Paragraph 9 does not, however, require the City to maintain Exhibit A promotees in rank while laying off their fellow white employees. Paragraph 9 in no wise contemplates an insulation from nondiscriminatory employer responses to adverse economic conditions. The City at all times reserved its right to lay off.

Second, Respondents assert that ¶¶ 6, 7 and 8 committed the City "unconditionally" to maintain minority representation on the Fire Department once a given level had been achieved. Under examination, the consent decree contains an obligation on the part of the City to make reasonable, good-faith efforts (City. Pet. A.64, ¶ 6), to raise the percentage of minorities in the long term (City Pet. A.64, ¶ 6) and to hire (City Pet. A.64, ¶ 7) and promote (City Pet. A.65, ¶ 8) minority applicants in cer-

tain percentages. The City did not renounce these commitments by implementing its Layoff Policy, part of which insured the right to return to former positions once the conditions creating the need for layoffs had been alleviated.[8] The City's managerial prerogative to lay off its employees by seniority was not surrendered in the consent decree. These paragraphs of the consent decree do not require the maintenance of certain levels of minority employment once achieved, nor do they insulate minorities from layoffs or demotions made pursuant to a bona fide seniority system.[9] Taken in sum total, Respondents' "interpretation" argument fails and reinforce the position of the Petitioners that Respondents are only entitled to enforcement of the actual terms of the consent decree as is made clear by an application of *Armour* to this case. *See United States v. Armour & Co.*, 402 U.S. 673 (1971) (Union Brief p. 16).[10]

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[8] Respondents admit that the uncontroverted evidence adduced at the May 8 preliminary injunction hearing was to the effect that the layoffs and demotions would be temporary in nature (Respondents' Brief p. 47). Also, the Layoff Policy contained a recall procedure (J.A. 89-90) that assured Respondents that they would be given the opportunity to return to their former positions before hiring and promotions resumed. These policies were consistent with the City's obligations under consent decree. The assertion made by the Court of Appeals and repeated by Respondents that the Layoff Policy amounted to an anticipatory repudiation (Respondents' Brief p. 53) is insubstantial and unsupported by the record.

[9] As set forth in the City's Brief on the Merits at p. 21, seniority-based layoffs would have had no greater adverse impact upon the achievement of the long-term goals under the consent decree than the layoff plan imposed upon the City by the District Court.

[10] Petitioners find it particularly revealing that Respondents fail to mention anywhere in their Brief on the Merits their waiver of their right to seek further relief contained in the consent decree.

C. *The District Court Exceeded Its Authority In Its Modification Of The Consent Decree*

Having demonstrated that the relief granted to Respondents was not contained within the four corners of the consent decree, Petitioners now turn to examine Respondents' contention that the District Court was acting within its authority when it modified the consent decree. Petitioners would show that the District Court failed to apply the correct rule of law in concluding that the consent decree should be modified and that the District Court must be reversed.[11]

As set forth in *Gautreaux v. Pierce*, 353 F.Supp. 423 (N.D. Ill. 1982) (cited in Respondents' Brief at p. 68), a consent decree embodies both a contract and a court order so that a party seeking to modify it faces a rather substantial burden. *Id.* at 426. The party opposing modification has a justified expectation that a bargain freely entered into will be honored. *Id.* As a result, the district court is not free to rewrite the terms of the decree and then enforce the decree as rewritten. *Id.* at 425-26. Certainly, those rules of general applicability carry much more force in the instant situation in view of the Respondents' waiver of further relief (City Pet. A.61).

Undaunted by these factors, Respondents urge the Court to judge the validity of the District Court's modification

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[11] The analysis utilized by the District Court was as follows:

> Now, the appellate authorities, and most particularly the Sixth Circuit authority, has spoken to this subject when you have a consent decree and there has been a change of circumstances. And then the district court can, and should be, called upon to determine whether some layoffs, and the method of laying people off is going to create discrimination, which the consent decree undertook to avoid.
>
> Now, I guess you might say that this court figures that, based on the results of the hearing, the court does have authority, if the record supports it, to tell the city that they cannot lay people off in a manner that will perpetuate discrimination against black people. Now, it is that simple. (J.A. 30)

against the standard whether the change would serve to effectuate or thwart the basic purpose of the consent decree (Respondents' Brief p. 67). A more thorough analysis is in order.

As a threshold matter, exceptional circumstances, new, changed or unforeseen at the time the decree was entered, are required in order to justify modification of the decree. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). While the District Court concluded that the consent decree did not contain a layoff provision (City Pet. A.73), it did not state that the City's planned layoffs presented the parties with an exceptional circumstance which would justify modification (*see* City Pet. A.72-79). In fact, the uncontroverted facts adduced by the District Court established that the City contemplated that the layoffs would be temporary and that the City had not lost its resolve or breached its commitment to comply with the consent decree (A.39).[12] Thus, the relief granted Respondents under the consent decree would not have been demonstrably "destroyed" (Respondents' Brief p. 68), nor had the City's conduct amounted to a violation of the terms of the decree. *Cf. Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981). Neither had events following the entry

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[12] Mayor Chandler emphasized in his testimony before the District Court that the City had not renounced its obligations under the consent decree:

> But I hope that you understand, and I certainly want Judge McRae to understand, that they are not losing what they gained by the promotion to lieutenant, because they are kept on a roster, and it is absolutely most certain that all of those people would be restored to their positions as lieutenant, they now having been bumped down, or having been bumped down because they are less senior. And being lieutenants, because they were promoted under this policy, we bump down temporarily, and in all likelihood will be back as a lieutenant maybe within six months, and certainly within a two year period. (J.A. 39)

of the consent decree established that the consent decree would fail to accomplish its intended result. *Cf. United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968).

The theoretical underpinning of Respondents' position, as well as the decisions of the courts below is as follows: had the City been permitted to apply its Layoff Policy, the relief granted under the consent decree would have been destroyed. A careful review of the uncontroverted facts shows the concept to be analytically unsound. The relief granted under the consent decree was, in essence, that the Memphis Fire Department would raise the level of minority employment in each rank to levels approximating the percentage of blacks in the labor force in the area on a long-term basis (City Pet. A.64). There was no deadline imposed for attaining this long-term goal. There was no provision requiring that a percentage be maintained once attained. Given that all those laid off or demoted were to be reinstated to their former positions before any further hiring took place, there was no threat that the attainment of the long-term goal would be delayed, much less "destroyed," if the Layoff Policy had been applied. In other words, had the Layoff Policy been applied the City would have reached its long-term goal at the same time it would under the application of the Court's order.

Assuming arguendo that exceptional circumstances were demonstrated, the District Court should then have weighed the equities in determining the hardship upon the moving party if modification was not granted and the hardship on the party opposing modification if the Court granted the relief sought, as well as the impact of modification upon innocent third parties. The District Court failed to engage in this important analysis. The City in this case had retained its managerial prerogative to implement its seniority policy should layoffs be necessitated. Respond-

ents had failed to seek constructive competitive seniority in their lawsuit or even to allege that the minority employees who would be benefited by the requested relief were, in fact, "victims of discrimination." On the other hand, innocent nonminority incumbent employees suffered greatly as a result of the District Court's injunctions.[13] In sum, the modification was inequitable and must be reversed.

III. The Relief Sought By Respondents Is Unavailable Under The Statutes They Seek To Enforce

Respondents misrepresent Petitioners' position as being "that a consent decree is invalid if it provides relief to a black who is not a proven victim of discrimination" (Respondents' Brief p. 89). Such a contention, they point out, would virtually abolish consent decrees in Title VII cases, if sustained (Respondents' Brief p. 90). Respondents have misrepresented Petitioners' position herein in order to divert the Court's attention from the weakness of their own position on the merits.

Petitioners argue not that parties are forbidden from agreeing to provide affirmative relief, but rather that a court cannot order a racial quota to provide competitive seniority relief to those who are not victims of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). As set out above in Section II, Respondents are neither entitled to the relief sought based upon the consent decree, nor are they entitled to a modification of the consent decree which provides such

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[13] For instance, Lt. Donald Wolfe, a white incumbent who was hired on July 16, 1968, was demoted while Percy Alexander, a black lieutenant who was hired on January 2, 1973, was retained in his position. Likewise in the inspector rank, Phillip T. Hall, a white employee who was hired on March 17, 1969, was demoted while Raymond McGehee, a black inspector who was hired on June 5, 1972, was retained in his position.

relief. Even if the District Court was correct under those circumstances in entertaining an application for the relief sought, Respondents would have had to prove their cause of action to obtain further relief. Respondents could not bypass the liability phase of litigation and proceed directly into the remedial phase to secure additional relief. In order to obtain the new relief sought, Respondents should have been required to establish their entitlement to such relief at the outset. Since Respondents were proceeding under Title VII, and 42 U.S.C. §§ 1981 and 1983, the relief sought necessarily would have had to be relief available under those statutes in a contested matter or litigated case.

Petitioners digress to note that prior decisions by this Court have established that parties are not prohibited by Title VII from consenting to race-conscious relief or relief in the absence of adjudicated victim status. *United Steelworkers v. Weber*, 443 U.S. 193 (1980).[14] However, the permissible range of relief to which parties to Title VII litigation may agree is broader than that which a court can impose upon the parties against their will. Petitioners assert straightforwardly that Title VII does not authorize the judicial award of constructive competitive seniority to persons who are not actual victims of discrimination in a *contested* case. It was not Petitioners' contention, or intention to assert or imply, that consentual relief of the type the City agreed to herein—hiring and promotional relief to persons not adjudicated victims—could not be agreed to and made part of a consent decree. Respondents' erroneous restatement of Petitioners' argument flies in the face of the City's conduct. The City has always maintained that the consent decree

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[14] In *Weber*, the Court also made it clear that it was not deciding, in that case, what a court might order to remedy a past proved violation of the Act. *Id.* at 200.

as agreed to is reasonable, equitable and lawful, has faithfully adhered to its obligations under the decree and has even defended the same against attack from third parties (*see* City Pet. A.62). *Stotts v. Memphis Fire Department*, 679 F.2d 579 (6th Cir.), *cert. denied sub nom. Orders v. Stotts*, 103 S.Ct. 297 (1982). Rather, it is Petitioners' position that a court may not impose the relief sought by Respondents in May, 1981 in the absence of adjudicated victim status, and that the quota relief imposed by the District Court exceeded its authority.[15]

To suggest as Respondents do (Respondents' Brief p.70) that the District Court's order does not mandate the use of a race-conscious standard in layoffs in light of its terms is ludicrous. The order mandates that in order to preserve the then-existing percentage of minorities on the Department, a disproportionate number of innocent incumbent whites be laid off or demoted pursuant to the order.[16] Thus, in the selection of those persons who would be laid off or demoted, the City was required by the Court's order, as it went down the seniority roster, to

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[15] Respondents' only response as to the validity of petitioners' legal analysis of the limits of Title VII is a brief mention of the argument purportedly arising from the legislative history of the Equal Employment Opportunity Act of 1972. Petitioners adopt the response to that argument set out in the Reply Brief for Petitioner, Boston Firefighters Union, Local 718, in the *Boston Firefighters* case, Nos. 82-185, 82-246 and 82-259, heard by the Court last term (Boston Firefighters' Brief, pp. 10-17).

[16] The May 18 order provides in pertinent part:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the defendants shall not apply the seniority policy proposed insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed in the Memphis Fire Department. The defendants should file a proposed plan to comply with this Court's injunction. (City Pet. A.78)

skip over or favor minorities solely because of their race. Clearly, the order required the use of a race-conscious standard in the selection of those employees to be adversely affected by the Layoff Policy or seniority system.

Likewise, the provision in the order requiring defendants to file a proposed plan to comply with the injunction demonstrates that Respondents are absolutely incorrect when they assert that "it was the city, not plaintiffs or the trial judge, which selected the race-conscious plan . . ." and that "the Court's June 25 order merely 'approved' the method selected by the city itself" (Respondents' Brief p. 76). It was the District Court, at the behest of Respondents, which ordered that the race-conscious plan be prepared and which approved the plan.

Interestingly, Respondents now argue in support of their position that there was no need for layoffs in the Fire Department, and that there were alternatives to layoffs and demotions (Respondents' Brief pp. 74-76). Yet, at the May 8 hearing, Respondents' counsel conceded the need for the City's action (J.A. 75). Further, as indicated by the District Court at the inception of the hearing, the District Court had no jurisdiction to determine whether the City could or could not lay off employees.[17] *See National League of Cities v. Ussery*, 426 U.S. 833 (1976). *No* party took exception to that ruling by the Court. In sum, those matters raised by Respondents speculating as to the need for and alternatives to layoffs

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[17] The District Court noted at the outset of the hearing:

> . . . [O]ne of the things that I did determine, and I state before we start the hearing, that I see no area where this Court has the authority to tell the City officials that they cannot, based on their own judgment, lay off some people. Now, I don't know whether people think I'm going to tell the City that they can't lay anybody off, but I have ruled that that is not an issue. (J.A 30).

and demotions are inapposite and entirely outside the record before this Court.

The argument that the system in operation is not a seniority system because it utilizes a facially neutral and nondiscriminatory alphabetical tie breaker is specious. As this Court has acknowledged, all seniority systems have ancillary provisions that accomplish necessary functions in the system, but are not directly related to an employee's length of employment. *California Brewers Association v. Bryant*, 444 U.S. 598, 607 (1980). The tie breaker is such a provision, and the system is nonetheless a seniority system despite its inclusion.

Further, the effects of the District Court's orders were not, as Respondents would have the Court believe, limited to three white employees who were placed on layoff status instead of three minority employees who held the same seniority date. The order also caused seven additional, senior white drivers to be laid off from their positions or demoted, five additional, senior white inspectors to be demoted, and nine additional, senior white lieutenants to be demoted. The true injustice was not the proposed action of the City in routinely applying its bona fide seniority system; the true injustice resulted from the application of the layoff/demotion system ordered by the District Court to the detriment of innocent incumbent employees. Relief is generally defined as "deliverance from oppression, wrong or injustice." *Black's Law Dictionary*, 1161 (5th ed. 1979). Where, as here, relief is granted in excess of the consent of the parties, and unsupported by any hearing on the merits or adjudication of wrongdoing, the concept is perverted and the order granting the relief must be reversed.

CONCLUSION

For the reason set forth above and in Petitioners' briefs on the merits, the decision and judgment of the Sixth Circuit should be reversed with instructions to dismiss the request for injunctive relief.

Respectfully submitted,

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